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Brief of Sire for P. C.
Supreme Court of the United States.

OCTOBER TERM, 1897.
Filed Jan. 3, 1898.
No. 227.

HENRY J. HAVNOR,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

In Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

ALBERT I. SIRE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

HENRY J. HAVNOR,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF
NEW YORK.

**Points for
Plaintiff in
Error.**

IN ERROR TO THE SUPREME COURT OF THE STATE
OF NEW YORK.

Statement of the Case.

This is an appeal on writ of error by Henry J. Havnor from a judgment of the Supreme Court of the State of New York entered on a remittitur from the N. Y. Court of Appeals which affirmed a judgment of the Supreme Court after an appeal to the Appellate Division thereof, from a judgment of the Court of Special Sessions of the City and County of New York, rendered November 4th, 1895, convicting Havnor of a violation of Chapter 823 of the Laws of 1895, commonly called the "Collins' Act," and fining him the sum of five dollars. This Act reads as follows :

" An Act to regulate barbering on Sunday.
" Section I. Any person who carries on or en-
" gages in the business of shaving, hair cutting or
" other work of a barber on the first day of the
" week shall be deemed guilty of a misdemeanor

" and upon conviction thereof shall be fined not
 " more than five dollars and upon a second convic-
 " tion for a like offense shall be fined not less than
 " ten dollars and not more than twenty-five dollars
 " or be imprisoned in the County Jail for a period
 " of not less than ten days nor more than twenty-
 " five days or be punishable by both such fine
 " and such imprisonment at the discretion of the
 " Court or Magistrate, provided that in the City of
 " New York and the village of Saratoga Springs,
 " barber shops or other places where a barber is
 " engaged in shaving, hair cutting or other work
 " of a barber may be kept open and the work of
 " a barber may be performed therein until one
 " o'clock of the afternoon of the first day of the
 " week.

" Section II. This Act shall take effect on the
 " first day of June, 1895."

This appeal is in the nature of a test case, to de-
 cide whether the Act is a constitutional exercise of
 legislative power.

Upon the trial the defendant testified uncontra-
 dicted to several facts, material as we believe to a
 proper legal construction of the Act.

These facts are *First*: That defendant's shop on
 Sunday enjoyed the patronage of a great many
 men who made it their practice to indulge in late
 rising on Sunday morning—a custom that very gen-
 erally obtains—and who owing to this habit were
 not able to reach defendant's shop to be shaved or
 take a bath until oftentimes one o'clock or after.
Second: That many of such customers resorted
daily to defendant's shop, in consequence of the
 rapidity with which their beards grew; and *Third*:
 that many of them were unable to shave them-
 selves, and that as to such, defendant's services
 became not only a matter of decency and conve-
 nience but even of positive necessity in the after-

noon of each Sunday after one o'clock, after which time the law forbade him to remain open or to ply his trade under any circumstances.

After this testimony defendant's counsel upon the grounds hereinafter set forth argued that Chapter 823, Laws of 1895, was unconstitutional and void and moved defendant's discharge. This was denied and the defendant found guilty and an exception duly taken, fined five dollars, which was paid under protest after which an appeal was taken to the Appellate Division where judgment was affirmed, after which an appeal was taken to the N. Y. Court of Appeals where by a divided Court standing four to three the judgment was also affirmed, and now the plaintiff in error appeals to this Court by writ of error to finally have determined the constitutionality of the Act in question.

Defendant's objections to the validity of the said Law are as follows :

POINT I.

The Act is void under Article I. of the constitution of this State, which provides that "no person shall be "deprived of life, liberty or property, without due process of law."

(See Art. 1. Sec. 1.)

It is void, not only under this clause of the State Constitution, but under the rights guaranteed by the Constitution of the United States to the citi-

zens of the several States, where Section I. of the 14th Amendment says, "nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of its laws."

It is void because it is an unwarrantable exercise of the Police power of the State, and operates to the injury of the defendant in his business not only without the least tendency to promote the good order, health or comfort of the community, but because it contributes directly to its discomfort and inconvenience.

On the threshold of this discussion we feel confident in stating as a result of research, that in our belief no case but this has yet arisen under the Sunday Law of the State of New York where the question has been passed upon by the Court of last resort whether barbering is a "work of necessity" so as not to fall within the inhibition against Sunday labor.

If we are correct, the decision of this case bids fair to be one "of first impression," so far at least as the State of New York is concerned.

The General law of New York State hitherto in effect and commonly called the "Sunday Law" passed as amended by Chapter 358 of Laws of 1883, reads as follows, as bearing on our point :

"All labor on Sunday is prohibited, excepting works of *necessity or charity*. In works of

“necessity or charity is included whatever is
 “*needful for the good order, health or comfort of*
 “*the community.*”

Now before this late Act prohibiting the exercise of a barber's trade on Sunday, we think that no one has ever thought barbering was anything else than a work of necessity within the definition of the Law of 1883, or that it was not in every way “needful for the good order, health or comfort of the community.”

But the good people of New York State have been treated to a genuine surprise by this new law, which overrides the general sentiment, proscribes Sunday barbering, and in effect pronounces it an act not administering to the people's comfort and convenience.

Assuming therefore that barbering has not hitherto been a violation of the Sunday law the latter is now in effect repealed by implication in so far as concerns the barber's trade. And with what reason? Have barber shops suddenly become places where disturbances abound, where disorderly people resort to break the peace of the Sabbath day and offend the general sense of decency and desire for repose? Surely on this score barber shops cannot have suddenly become offending causes. Who ever heard of a barber shop as a haunt for disorderly characters? Who ever thinks of a barbershop as a place of noise or revel? Who remembers it in his experience as a place where aught but peace reigns, broken only by the busy sound of the scissors, the scrape of the razor or a scrap of quiet conversation. In short it would be simply absurd to urge as a reason for closing barber shops on Sunday that they encouraged noise.

On what ground then can the sudden hostility entertained against them by our lawmakers be ex-

plained ? Can it be said they are unhealthy ? That would be too idle to discuss. Can they be said in any way to have an immoral tendency ? Too absurd to claim.

Does one ever go to a barber shop to gamble, to drink, to indulge in ribaldry, or any of the various forms of vice ? The thing is unheard of, except that maybe a barber shop occasionally suffers in this respect in common with all other places of most perfect respectability. We never heard of a barbershop made the subject of attack on this score. Taking the world over, was there ever a more inoffensive resort than a barber shop ? Is there a place that is less associated with what is concededly bad ? Is there, in short, a place that from the earliest keeping of shops in civilized communities, has maintained in greater degree a more respectable character ?

On the other hand can we point to a bodily attention, which is so grateful, comfortable and needful than that derived from the ministration of a barber ? His performance of your toilet is not merely a luxury. In modern as well as ancient civilization, in civilized as well as savage communities his services have always been in request as an *absolute necessity*. The barber's office is not alone one which tends to improve the personal appearance, but submitting to his hands is a distinctively cleanly act, and if cleanliness is next to Godliness it surely cannot be more reprehensible to repair to your barber to be shaved on Sunday, than to take a bath at your home and to shave yourself on that day.

What shall be said of a law that not only fines and imprisons the unhappy craftsman for aiding his patrons to assume a decent Sunday exterior within the precincts of his shop, but which forsooth subjects him to pains and penalties *for even visiting a customer's house* and there removing the facial growth or shearing his locks !!

For grotesque and ridiculous as it may appear, such a deed is made by this precious statute an offense as great as when the barber welcomes his customer to the chair in his shop. Truly such a law is a reproach to the enlightened age in which we live, and takes us in imagination back to medieval times, when the length of one's shoes and the dimensions of one's hat or frock were deemed proper subjects for legislative interference.

It may be said in answer to our argument for Sunday barbering, viewed as a necessity, that it cannot be such, because a man may visit his barber on Saturday night, or in New York City, he may arise at his customary week-day hour and have his shaving and trimming over with by the closing hour of one P. M. This will not serve in reply, because with a large class of persons the confirmed habit obtains of indulging in protracted rest on Sunday morning, which no one will pretend to say is not salutary and necessary to recoup the wearied frame of man from the exhaustive labors of the past week and prepare it for renewed effort in that to come.

With such as find it necessary thus to arise at a late morning hour and who naturally take their first meal at nearly noon, will it be said that a visit to their barber afterward even though it be after the hour of one o'clock is not as absolutely necessary and as much justified as the earlier morning visit of the man who is an earlier riser?

The defendant has made it appear that his customers on Sunday are chiefly of the leisurely sort to which we have referred.

Shall we conclude that the legislature has the right to prescribe the hours on Sunday when a man may be shaved or take a bath at his barbers *or be shaved at his house*. As well might our law framers set the hour when one may take his meals,

go to bed, take a drive, or ride in a horse car, or rise in the morning. But more is not needed to show the absurdity of the law as viewed by everyday standards of common sense in the minds of everyday people.

We are aware, however, that this is not enough in itself upon which to pass sentence on the law, and that it must be judged by the rules which the decisions have laid down.

It is well that the courts of our State have had many occasions to condemn ill advised legislative acts that have been obnoxious to the constitutional safeguards.

That the legislature cannot under the guise of its police power enact laws to suppress harmless acts which have no relation to the *health, safety, or well being of society* has been too often held to now admit of question.

One of the most instructive as well as late cases on the subject is

People *vs.* Gilson, 109 N. Y., 389, and cases cited.

It involved the construction of a provision of the penal code prohibiting the sale of any article of food upon any inducement that anything else would be given as a gift, prize or premium therewith.

The Court in pronouncing the act inimical to the guaranteed rights of a citizen, uses the following language:

“The following propositions are firmly established and recognized: a person living under our constitution has the right to adopt and follow such lawful industrial pursuit not injurious to the community as he may see fit. The term ‘liberty’ as used in the constitution is not dwarfed into mere freedom from physical re-

" straint of the person of the citizen by incarceration,
 " tion, but is deemed to embrace the right of man
 " to be free in the enjoyment of the faculties with
 " which he had been endowed by his creator, *subject only to such restraint as is necessary for*
 " *the common welfare.* Liberty in its broad sense
 " as understood in this country means the right
 " not only of freedom from servitude, imprisonment
 " or restraint, but the right of one to use his
 " faculties in all lawful ways to live and work
 " when he will, to earn his livelihood in any lawful
 " calling and to pursue any lawful trade or avo-
 " cation. These principles are contained and
 " stated in the above language in various cases,
 " among which are :

- " Livestock Association *vs.* Crescent
- " City Co., 1 Abb. (U. S.), 388, 389.
- " Slaughter House cases, 16 Wall., 36.
- " Matter of Jacobs, 98 N. Y., 98.
- " Berthoef *vs.* O'Reilly, 74 N. Y., 509.
- " People *vs.* Marx, 99 N. Y., 377."

The learned Court then proceeds to criticise
 the misguided folly which actuates some people
 who fly to the legislature to secure the enactment
 of foolish laws in the hope of protection against
 fancied ills they suffer from the competition of
 others in trade, and continues :

" It cannot be truthfully maintained that this
 " legislation does not seriously infringe upon the
 " liberty of the owner or dealer in food products
 " to pursue a lawful calling in a proper manner or
 " that it does not to some extent at least deprive
 " a person of his property by curtailing his power
 " of sale and unless this infringement and deprivation
 " are reasonably necessary for the common
 " welfare, or may be said to fairly tend in that
 " direction or to that result the legislation is in-

“ valid as plainly violative of the constitutional
 “ provision under discussion.

“ This brings us to the consideration of the ques-
 “ tion whether the act is valid as proper exercise
 “ of what is by way of classification called the po-
 “ lice power of the State. That power has never
 “ yet been fully described, nor its extent plainly
 “ limited further at least than this, it is not above
 “ the constitution, but it is bounded by its provis-
 “ ions, and if any liberty or franchise is expressly
 “ protected by any constitutional provision it can-
 “ not be destroyed by any valid exercise by the
 “ Legislature or the executive of the police
 “ power. * * ”

The Court recites with approval the case of
In re Jacobs (98 N. Y., 107),

in which the act prohibiting the manufacture of
 cigars in tenement houses was annulled as uncon-
 stitutional and to which we hereafter refer, and
 also the case of

People vs. Marx (99 N. Y., 377),

where the Act prohibiting the manufacture and
 sale of oleomargarine was adjudged unconstitu-
 tional as proscribing an important branch of in-
 dustry not *injurious to the community and not*
fraudulently conducted.

“ Under an exercise of the police power the
 “ enactment must,” the Court continues, “ have
 “ reference to the comfort, the safety or the wel-
 “ fare of society and must not be in conflict with
 “ the constitution. The law will not allow the
 “ rights of property to be invaded under the guise
 “ of a police regulation for the protection of
 “ health, when it is manifest such is not the object
 “ and purpose of the regulation (see *Austin vs.*
 “ *Murray*, 16 Pick., 121, 126; *Com. vs. Alger*, 7

"Cush., 53, 84. Cited with approval in matter of
"Jacobs, *supra*).

"As is also said in the last case, it is generally
"for the Legislature to determine what laws and
"regulations are needed to protect the public
"health and serve the public comfort and safety,
"and if its measures are calculated, intended, con-
"venient or appropriate to accomplish such ends
"the exercise of its discretion is not the subject of
"judicial review. But those measurers must have
"some relation to these ends. Courts must be
"able to see upon a perusal of the enactment that
"there is some fair, just and reasonable connec-
"tion between it and the ends above mentioned.
"Unless such relation exists the enactment can-
"not be upheld as an exercise of the police
"power."

We think that the case at bar calls for an appli-
cation of precisely the same principles.

If there ever was a form of labor excusable on
the Sabbath it is the exercise of a barber's trade.
It is certainly so much a matter of necessity as to
warrant its classification with other acts indulged
in on that day which have never since the days of
our Puritan ancestors been thought the reverse.
It is as necessary as the labor performed in
preparing food for Sunday meals and any
other usual routine of duty on that day. In
the days of the Blue Laws all food was cooked
beforehand and eaten cold on Sunday. Shall we
say that because we have relaxed from this
rigorous custom in these latter days that we are
not entertaining rational views on questions of
Sunday observance? Might not our lawgivers
with equal justice prohibit all forms of travelling
on Sunday, including Sunday excursions, driving,
bicycling or even Sunday walks? These are all
forms of exercise if peaceably conducted, with

which no American community with our ideas of government will ever concede that the Legislature has a right to interfere. In deciding upon the propriety of many of such acts on the Sabbath, the better view is that each individual must be governed by his own conscience.

Matter of Jacobs (98 N. Y., 98), was decided in 1885, three years earlier than the Gilson case from which we have so largely quoted, and it deals with the subject of constitutional limitations with great ability and learning, and applies with as much force to the case at bar as the opinion in the case of Gilson.

The act under consideration in that case was Chapter 272 of the Laws of 1884, entitled "An Act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses, &c."

Section 1 reads: "The manufacture of cigars or preparation of tobacco in any form in any floor or any part of any floor in any tenement house is hereby prohibited if any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking or doing any household work therein."

Section 2. Defined what should constitute a tenement house.

Section 3. Exempted the first store floor from the operation of the act, and

Section 5. Made a violation of the act a misdemeanor, and prescribed the punishment therefor.

The Court criticises the operation of the law in vigorous language, and demonstrates the resulting injustice of it toward poor cigar makers whose very existence may depend upon their freedom to ply their trade at their homes, and adds, "it is therefore plain that this law interferes with the

“ profitable and free use of his property by the
 “ owner or lessee of a tenement house who is a
 “ cigar maker, and trammels him in the application
 “ of his industry and the disposition of his labor,
 “ and thus in a strictly legitimate sense it arbi-
 “ trarily deprives him of his property and of some
 “ portion of his personal liberty.

“ The constitutional guaranty that no person
 “ shall be deprived of his property without due
 “ process of law may be violated without the physi-
 “ cal taking of property for public or private use.
 “ Property may be destroyed or its value may be
 “ annihilated ; it is owned and kept for some useful
 “ purpose and it has no value unless it can be used.
 “ Its capability for enjoyment and adaptability
 “ to some use are essential characteristics and
 “ attributes without which property cannot be con-
 “ ceived ; and hence any law which destroys it or
 “ its value, or takes away any of its essential at-
 “ tributes, deprives the owner of his property.”

The application of this doctrine to the case at bar is readily apparent. The “ essential attributes,” as the Court terms them, of the plaintiff in error’s property is the income he derives from shaving his customers’ faces and shearing their hair. The property value of his shop equipment is of no use to him if not employed in his trade.

Sunday is the barber’s busiest day, because out of respect to the day and a commendable desire to be clean, a greater number then seek his shop. Does his making of this day like other days seem less respectful than the case of the butler, maid or cook whose domestic duties are perchance made greater on Sunday by reason of numerous guests at the master’s table ?

“ All laws, therefore,” the Court goes on to say,
 “ which impair or trammel these [constitutional]
 “ rights which limit one in the choice of a trade or

“ profession or confine him to work or live in a
 “ specified locality or exclude him from his own
 “ house or restrain him in his otherwise lawful
 “ movements (except as such laws may be passed
 “ in the exercise by the Legislature of the police
 “ power which will be noticed later), are infringe-
 “ ments upon his fundamental rights of liberty,
 “ which are under constitutional protection ”

Quoting in this connection from *Butchers' Union Co. vs. Crescent City Co.* (111 U. S., 746).

And *Livestock &c., Assn. vs. Crescent City Co.*, 1 Abb. (U. S., 389).

In speaking of what is police power, the Court goes on to say :

“ The limit of the power cannot be accurately
 “ defined and the Courts have not been able or
 “ willing definitely to circumscribe it. But the
 “ power, however broad and extensive is not above
 “ the constitution. When it speaks, its voice
 “ must be heeded. It furnishes the supreme law,
 “ the guide for the conduct of legislators, judges
 “ and private persons, and so far as it imposes re-
 “ straints, the police power must be exercised in
 “ subordination thereto. Judge Cooley, speaking of
 “ the regulation by the Legislature under the
 “ police power of the conduct of corporations
 “ holding inviolable charters, says : The limit to
 “ the exercise of the police power in these cases,
 “ must be this ; the regulations must have refer-
 “ ence to the comfort, safety and welfare of
 “ society ; they must not be in conflict with any
 “ of the provisions of the charter, and they must
 “ not, under pretense of regulation take from the
 “ corporation any of the essential rights and privi-
 “ leges, which the charter confers. * * *

“ In *Potter's Dwarries on Statutes*, 458, it is said
 “ that : the limit to the exercise of police power
 “ can only be this ; the legislation must have ref-

“ erence to the comfort, the safety or welfare of
 “ society, it must not be in conflict with the pro-
 “ visions of the constitution. * * *

“ In *Austin vs. Murray* (16 Pick., 121-
 126),

“ it is said : the law will not allow the rights of
 “ property to be invaded under the guise of a po-
 “ lice regulation for the promotion of health, when
 “ it is manifest that such is not the object and
 “ purpose of the regulation. * * *

“ In the *Slaughterhouse* case (16
 “ Wall., 36),

“ FIELD, J., says : All sorts of restrictions and
 “ burdens are imposed under the police power, and
 “ when these are not in conflict with any constitu-
 “ tional prohibitions or fundamental principles,
 “ they cannot be successfully assailed in a judicial
 “ tribunal. * * * But under the pretense of
 “ prescribing a police regulation the State cannot
 “ be permitted to encroach upon any of the just
 “ rights of the citizen which the constitution in-
 “ tended to secure against abridgment.

“ In *Coe vs. Schultz* (47 Barb., 64), a learned
 “ judge, speaking of the constitutional limitations
 “ upon the police power says : I am not willing to
 “ concede that the Legislature can constitutionally
 “ declare an act or thing to be a common nuisance,
 “ which palpably, according to our present experi-
 “ ence or information, is not and cannot under
 “ any circumstances be a common nuisance, by
 “ the common law definitions or common law de-
 “ cisions. I am not willing to conclude that the
 “ legislature can constitutionally declare or author-
 “ ize any sanitary commission or board to declare
 “ the keeping or the use, in any way of sugar or
 “ vinegar to be a common nuisance, because the

“ one is sweet and the other sour or for any other
 “ reason.

“ These citations are sufficient to show that the
 “ police power is not without limitations, and that
 “ in its exercise the legislature must respect the
 “ great fundamental rights guaranteed by the con-
 “ stitution. If this were otherwise the power of
 “ the legislature would be practically without
 “ limitation. In the assumed exercise of the police
 “ power in the interest of the health the welfare or
 “ the safety of the public, every right of the citizen
 “ might be invaded and every constitutional bar-
 “ rier swept away.

“ Generally it is for the legislature to determine
 “ what laws and regulations are needed to protect
 “ the public health and secure the public comfort
 “ and safety, and while its measures are calculated,
 “ intended, convenient and appropriate to accom-
 “ plish these ends, the exercise of its discretion is
 “ not subject to review by the Courts. But they
 “ must have some relation to these ends. Under
 “ the mere guise of police regulations personal
 “ rights and private property cannot be arbitrarily
 “ invaded, and the determination of the legisla-
 “ ture is not final or conclusive. * * * *

“ It matters not that the legislature may in the
 “ title to the act or in its body declare that it is
 “ intended for the improvement of public health.
 “ Such a declaration does not conclude the Courts,
 “ and they must yet determine the fact declared
 “ and enforce the supreme law.”

On page 112 of the same opinion, the Court con-
 tinues :

“ A law enacted in the exercise of the police
 “ power must in fact be a police law. It must be
 “ a law for the promotion of the public health.”

So we beg leave to add in criticising the act

passed by the late legislature of which the plaintiff in error complains, that in no conceivable way can the prohibition of barbering on Sunday tend to promote public comfort or public welfare. We think we have shown that the exercise of a barber's trade *directly promotes in the most harmless manner the comfort, convenience and necessities of the citizen.*

In the language of the above decision it is for this Court to say whether the act can stand as a lawful exercise of the police power of the State of New York within the limitations assigned by its Court of last resort, and by the decisions of the Supreme Court of the United States before which we now stand.

In concluding a review of the opinion in the Jacobs case we cite a portion of the language on page 115 as follows :

“ When a health law is challenged in the Courts
 “ as unconstitutional on the ground that it ar-
 “ bitrarily interferes with personal liberty and
 “ private property without due process of law,
 “ the Courts must be able to see that it has at
 “ least in fact some relation to the public health,
 “ that the public health is the end actually aimed
 “ at, and that it is appropriate and adapted to
 “ that end. This we have not been able to see in
 “ this law, and we must therefore pronounce it un-
 “ constitutional and void.”

Even as late as 1895 has been decided the case of
 Health Dept. *vs.* Rector, &c., 145 N. Y.,
 p. 32,

and that of

People *ex rel.*, &c. *vs.* Warden, &c.,
 144 N. Y., 529.

This Court will in both of these cases find laid down identically the same doctrine as that ex-

pressed in cases already quoted, with regard to the constitutional limits of the police power.

We do not deny the power of the Legislature to enact appropriate measures for the decorous observance of the Sabbath and to protect it from desecration, so that we have no quarrel with the great case of *Lindmuller vs. The People*, 33 Barber, 548, which is usually cited as the leading authority in support of the Legislative power to enact Sunday laws in N. Y. State.

The *Lindmuller* case is undoubtedly law to-day in New York State. The opinion written in it was a masterly defense of the sacredness of the Sabbath and a recognition of it as the law of the land on the broad plane of Christianity, but the facts of that case were essentially different from ours.

No one could argue for a moment that giving a theatrical exhibition, ministering to the æsthetic senses alone, bears comparison on the score of necessity with tonsorial operations, which are as perfectly inseparable from cleanliness and bodily comfort as a person's morning ablutions.

It will not do to say that the barber can duly serve his patrons on Saturday or any other day of the week and that people who cannot manage to be shaved then or on Sunday morning ought to go without it. Many people have beards which absolutely require removal every single day, including Sunday, as the proof shows in the case at bar.

What will a man so furnished do if he cannot go to his barber nor his barber to him on Sunday, provided he has never learned to shave himself, and there are many who cannot do so.

We insist that when the learned Court in the *Lindmuller* case said that the Legislature was the sole judge of the propriety of its laws in the passage of Sunday measures it could not have had in contemplation the spectacle of a Legislature under-

taking to pass a law suppressing an act as innocent from every standpoint of morality as any in the routine of daily household economy, Sunday included.

We submit that the doctrine in the Lindmuller case must be limited to facts presented which show at least some excuse for the exercise of the legislative discretion, *some rational* ground at least for legislative interference even though such interference were made subject of grave criticism as to its wisdom and propriety.

We are confident that the principles laid down in the Jacobs and Gilson cases which we have quoted extensively in our brief must be taken as modifying the force of the Lindmuller case and discriminating between the cases where the legislature has acted with some *plausability* and cases where it has put in force a law which cannot be defended with *any show of reason whatever*.

We think to press again upon the Court's attention that the Collins' Law not only closes barber shops but interdicts a barber from waiting on a customer even at his house.

The highest Court of Illinois has recently pronounced a law of that State which closed barber shops on Sunday.

See *Eden vs. The People*, 161 Ill., p. 296.

The opinion rendered reads in part as follows :

" This statute, as has been seen, declares : That
 " it shall be unlawful for any person or persons to
 " keep open any barber shop or carry on the bus-
 " iness of shaving, haircutting or tonsorial work
 " on Sunday. That act is plain and its meaning is
 " obvious ; the owner of a place who carries on the
 " the business of a barber is prohibited from doing
 " any business whatever during one day in the

" week : he may have in his employ a dozen men
 " and yet during one day in seven he is deprived
 " of their labor and also deprived of his own labor.
 " The income derived from his place, and his own
 " labor, and the labor of his employes is his prop-
 " erty, but the legislature has by the Act taken
 " that property from him. The journeyman bar-
 " ber who works by the day or week, or for the
 " share or amount he may receive from customers
 " for his services, is by the law denied the right of
 " laboring one day in the week ; he may rely solely
 " upon his labor for the support of himself and
 " family, his labor may be the only property that
 " he possesses, and yet this law takes that prop-
 " erty away from him, his labor is his capital and
 " that capital is all the property he owns. Can a
 " law which takes that from a laborer be sus-
 " tained ? The Constitution of the United States
 " says that the State shall not deprive any person
 " of property without due process of law, and our
 " State Constitution declares the same thing.
 " What is understood by the term due process of
 " law is not an open question. 'Due process of
 " law' is synonymous with 'law of the land,' and
 " the 'law of the land' is 'general public law,
 " binding upon all the members of the community,
 " under all circumstances and not partial or pri-
 " vate laws, affecting the rights of private individ-
 " uals or classes of individuals.' Millett *vs.* The
 " People, 117 Ill., 294. * * *

" In Tiedeman's Limitation of Police Powers,
 " the author, Section 85, says: The State in its
 " exercise of police power is, as a general proposi-
 " tion, authorized to subject all occupations to a
 " reasonable regulation where such regulation is
 " required for the protection of the public
 " interest or for the public welfare. It is
 " also conceded that there is a limit to the exer-

" cise of this power, and that it is not an unlimited
 " arbitrary power which would enable the Legis-
 " lature to prohibit a business the prosecution of
 " which inflicts no damages upon others. The
 " author also lays down the rule that it is in the
 " discretion of the Legislature to institute such
 " regulations when a proper case arises. But it is
 " a judicial question whether the mode or calling
 " is of such a nature as to justify police regulation.
 " In *Millett vs. The People*, *supra*, in speaking of
 " the police power of the State as applicable to the
 " case there before the Court, it is said: Their re-
 " quirements have no tendency to insure the per-
 " sonal safety of the miner or to protect his property
 " or the property of others. They do not meet
 " Dwarris's definition of police regulation. They
 " do not have reference to the comfort, the safety
 " or the welfare of society (Dwarris, 458). In
 " *Austin vs. Murray*, 16th Pick., 121, it was said :
 " The law will not allow the rights of property to
 " be invaded under the guise of a police regulation
 " for the promotion of health when it is manifest
 " that such is not the object and purpose of the
 " regulation. See also *Watertown vs. Mayo*, 109
 " Mass., 315, and cases referred to in the matter of
 " application of *Jacobs*, 98 N. Y., 109. * * *

" It will not and cannot be claimed that the law
 " in question was passed as a sanitary measure or
 " that it has any relation whatever to the health of
 " society. As has been heretofore foreseen as a
 " general rule, a police regulation has reference to
 " the health, comfort, safety and welfare of
 " society. How it may be asked is the health,
 " comfort, safety or welfare of society to
 " be injuriously affected by the keeping open
 " of a barber shop on Sunday. It is a matter of
 " common observation that the barber business as
 " carried on this State is both quiet and orderly.

“ Indeed it is shown by the evidence incorporated
 “ in the record that the barber business as con-
 “ ducted is quiet and orderly, much more so than
 “ many other departments of business. In view
 “ of the nature of the business and the manner in
 “ which it is carried on, it is difficult to perceive
 “ how the rights of any person can be affected or
 “ how the comfort and welfare of society can be
 “ disturbed. If the Act was one calculated to pro-
 “ mote the health, comfort, safety and welfare of
 “ society then it might be regarded as an exercise
 “ of police power of the State. In *Railway vs.*
 “ *Jacksonville*, 67 Ill., 37, it was held, if the law
 “ prohibits that which is harmless in itself or re-
 “ quires that to be done which does not promote
 “ the health, comfort, safety or welfare of society,
 “ it would in such case be an unauthorized exer-
 “ cise of power, and it would be the duty of
 “ Courts to declare such legislation void.

“ In *Ritchie vs. The People*, in speaking of the
 “ police power of the State, the Court said : ‘The
 “ ‘ police power of the State is that power which
 “ ‘ enables it to promote the health, comfort, safety
 “ ‘ and welfare of society. It is very broad and far
 “ ‘ reaching, but is not without its limitations.
 “ ‘ Legislative Acts passed in pursuance of it must
 “ ‘ not be in conflict with the Constitution and
 “ ‘ must have some relation to the ends sought to
 “ ‘ be accomplished, that is to say, to the comfort,
 “ ‘ welfare or safety of society. Where the
 “ ‘ ostensible object of an enactment is to secure
 “ ‘ the public comfort, welfare or safety, it must
 “ ‘ appear to be adapted to that end ; it cannot
 “ ‘ invade the rights of persons and property
 “ ‘ under the guise of a mere police regulation,
 “ ‘ when it is not such in fact ; and where such an
 “ ‘ Act takes away the property of a citizen or in-
 “ ‘ terferes with his personal liberty, it is the

“ ‘ province of the courts to dermine whether it is
 “ ‘ really an appropriate measure for the promo-
 “ ‘ tion of the comfort, safety and welfare of so-
 “ ‘ ciety.’ We do not therefore think the law was
 “ ‘ authorized by the police power of the State.
 “ ‘ The judgment will be reversed.’ ”

POINT II.

The Act is an instance of Class legislation and should be condemned on this ground as against the guaranteed rights of the citizen under the U. S. Constitution.

It may with truth be admitted that the Legislature has power to pass laws which bear with different force upon different localities.

Where there is a shadow of reason for the discrimination, the law-making power must needs be thus broad. So that we do not declaim against the Collins Law on this account, but we do declaim against it as class legislation because *without reasonable excuse* or justification, it grants a privilege to New York and Saratoga barbers, which it denies to all other barbers in the State.

We urge this reason advisedly, being well aware that *our* plaintiff in error is among those allowed by gracious legislative permission to keep open Sunday forenoon. This partial exemption is not, however, received kindly by him because Sunday afternoon would be a far better time for his trade than Sunday morning, since his class of customers have been early afternoon patrons as the testimony shows.

But we think we can criticise this law on general grounds, and from the standpoint of the barber living *outside* of New York or Saratoga who is not in a measure favored by the exemption. For if it is invalid as affecting one section of territory it is invalid everywhere and as against all.

What would be thought of an act which interdicted barbers below Fourteenth street in the city of New York from practicing their trade while above that street the trade was permitted, yet this would be a parallel case.

What reason in law or morals is there for discriminating between barbers in New York and Saratoga and those elsewhere. If the measure is to be upheld as a police regulation designed to promote order and the proper observance of Sunday then as so often repeated in the opinions we have quoted, the law must by its terms have *some rational tendency*, some appropriateness toward the end aimed at, but as we think we have abundantly shown, the operation of the law is *absolutely destitute* of such end, because in no sense does barbering in itself offend against the holy day any more than eating, dressing, walking or any other necessary act.

We cannot rest our case without directing considerate attention of this learned Court to the two dissenting opinions of Judges Gray and Bartlett in the N. Y. Court of Appeals.

Judge Gray, while not denying the power of the legislature within reasonable limits to enact laws against the desecration of the Sabbath, maintains that it has no right to interfere with a calling that is necessary to the comfort and decency of the citizen (see fol. 112 of Record). And we may add that it is decidedly against the genius and spirit of American institutions to put in force in this age and generation a sumptuary law, which is, we

think, an impertinent interference with every man's right to arrange his toilet on Sunday.

But, added to this arraignment of the law, Judge Gray disapproves of it because he thinks it is purely class legislation. At folios 113 and 114 of the record, he says that if the act could be defended as a fair exercise of the State's police power, yet it is without shadow of excuse in closing up barber shops on Sunday in all other parts of the State, while permitting them to remain open for a part of that day in New York and Saratoga Springs.

This brings up the point whether such a discrimination is not directly obnoxious to the Fourteenth Amendment of the U. S. Constitution as explained in the case of

Hayes *vs.* State of Missouri, 120 U. S.,
p. 68,

where it is said.

“The 14th Amendment requires that all persons subjected to such legislation, *i.e.*, legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate—shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. As is said in *Barbier vs. Connelly*, 113 U. S., 27-32 — speaking of the 14th Amendment; “Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application if within the sphere of its operation it affects all persons similarly situated “is not within the amendment.”

See also *Weston vs. Nevin*, 128 U. S.,
p. 578.

How can it be said that this law bears with equal force upon all barbers within the State "similarly situated"? For aught we see, barbers in all the larger cities of the State would be "similarly situated" in this respect, that municipal conditions affecting their hours of labor as suited to the requirements of their customers are generally different from the conditions that affect the business operations of country and village barbers.

In the villages and smaller settlements of the State, we are all aware that the average citizen is not by press of business prevented from calling on the barber to be shaved on Saturday evening, while in larger places Saturday evenings are generally busier periods, involving detentions which interfere with a man's visiting his barber untill Sunday. Therefore with such a condition of affairs in view, a law might be defended as not a specimen of class legislation, which closed barber shops on Sunday in all small centres of population where the male inhabitants might be presumed as not being inconvenienced thereby, and allowing them to remain open for at least a time on Sunday to dwellers in larger municipalities.

This distinction in such a law would have found a justifying cause as against attack on the score of its being class legislation for, as against all barbers similarly situated and under like conditions, the law would bear with equal force, *i. e.*, *all* city barbers could hold open for a time on Sunday, while *all* country barbers could not, and the reason for discrimination would be understood; but where is such a justifying distinction found when we reflect that New York City is a great city, and Saratoga Springs is an infinitely smaller city, a village, indeed, at least in name?

In no such sense as we have suggested can barbers in these two places be said to be sim-

ilarly situated. Though if the discriminating feature were given operation in all cities of any size, specifying which they were, and taking in for example New York City, Albany, Troy, Brooklyn, Buffalo and others, then this precise objection would be overcome.

Appropriate to this discussion is the decision of the Supreme Court of Ohio in the case of *City of Cincinnati vs. Steinkamp*, 43 N. E. R., p. 490.

We subjoin the syllabus and the major part of the opinion :

“ Sections 32 and 61 of the act of February 28, 1888, entitled ‘ An Act to regulate the construction of buildings within any city of the first class and first grade,’ &c. (85 Ohio Laws, 34), which require, among other things, that all buildings (save private residences) of three or more stories in height shall be provided with suitable fire escapes, and require the owner or occupant, upon 30 days’ notice by the fire inspector, to put up such escapes, and provide punishment by fine for non-compliance with such order, and empower a Court of equity, on application of the inspector, by suit in the name of the city, to enforce the provisions of the act and enjoin the use or occupation of any building used in violation of the act, are not invalid as depriving the owner of the use of property without the intervention of a jury, nor as depriving him of due process of law. But said sections are in conflict with section 26, art. 2, of the Constitution, which prescribes that “ all laws of a general nature shall have a uniform operation throughout the State,” and are therefore invalid, inasmuch as the act is one of a general nature, and has operation only in the City of Cincinnati.

“ On the latter point the Court said, in part :

" In State *vs.* Bargas (53 Ohio St.,—41 N.E., 245),
 " it is held that 'laws providing for the pub-
 " lic support of the poor are of a general nature,'
 " and that 'an act by which the general assembly
 " attempts to exempt counties from the operation
 " of general laws on account of trivial differences in
 " population are not of uniform operation through-
 " out the State' (see also *Ex parte* Falk, 42 Ohio
 " St., 638, and State *vs.* Ellet, 47 Ohio St., 90; 23
 " N. E., 931). It is observed by BOYNTON, J., in
 " McGill *vs.* State (*supra*): 'The difficulty en-
 " countered in all cases where a legislative act is
 " alleged to contravene the provision requiring the
 " uniform operation of law of a general nature lies
 " in determining what constitutes a law of that
 " nature, within the meaning of the Constitution.
 " The test is said to depend upon the character of
 " its subject matter; that if that is of a general, as
 " distinguished from a local or special nature, ex-
 " isting in every county throughout the State—a
 " subject in which all the citizens have a common
 " interest—then the law is one of a general nature,
 " requiring a uniform operation throughout the
 " State.' 'Existing in every county throughout
 " the State' means, we suppose, only in every
 " county where the conditions of the statute exist;
 " for, in order to be general and uniform in opera-
 " tion, it is not necessary that the law should op-
 " erate upon every person in the State, nor in every
 " locality. It is sufficient, the authorities coincide
 " in holding, if it operates upon every person
 " brought within the relation and circumstances
 " provided for, and in every locality where the
 " conditions exist. But, on the other hand, it
 " seems equally well settled, a law is not of uni-
 " form operation if it exempts a portion of those
 " coming within its terms, that is, if it confers a
 " privileges or imposes burdens upon some of a

“ class answering the description which are not
 “ conferred or imposed upon all others belonging
 “ to the same category. And it would seem to
 “ follow from this that the constitutional require-
 “ ment of uniform operation throughout the State
 “ is not answered by showing that the law is of uni-
 “ form operation with in one city of the State only
 “ however populous, and even though described
 “ as a city of the first grade of the first class, if
 “ it appears that the conditions undertaken to be
 “ legislated upon are common to many other sec-
 “ tions of the State. The subject of the statute
 “ under consideration is the protection of persons
 “ from the dangers of fire. This is implied in its
 “ title, as well as subject matter, and is perhaps
 “ made clearer by the title of the amendment of
 “ April 18, 1892, which is entitled ‘ An Act to
 “ to provide for the better protection of human
 “ life against fire,’ &c. Protection of life and limb,
 “ it would seem, is not a local matter, but is a
 “ matter of general public interest, in which every
 “ person in the State coming within the category
 “ of people exposed to the dangers intended to be
 “ guarded against is equally interested with every
 “ other such person, and it would appear to be as
 “ much the duty of owners of buildings answering
 “ to the description as to construction and occu-
 “ pancy of those named in the statute to observe
 “ the humane directions of this act whether lo-
 “ cated in one part of the State or in another.
 “ Doubtless there may be greater dangers in a
 “ thickly populated city from the causes named
 “ than in the rural districts, but how can it be said
 “ that there is any appreciable difference between
 “ the hazards incident to occupancy of such build-
 “ ings in the City of Cincinnati and those to be
 “ encountered in Cleveland, Columbus, Toledo, or
 “ any other of the larger cities of the State? If

"any reasons of a local character exist which
 "require this legislation for Cincinnati which do
 "not apply with equal force to other cities, none
 "appear on the surface, and certainly none have
 "been suggested. Being a law of a general nature,
 "not adapted alone to Cincinnati, and lacking the
 "requirement of uniform operation, we are of
 "opinion that the sections cited are in clear con-
 "flict with section 26 of article 2 of the Constitu-
 "tion; and realizing, as every observer must, the
 "growing tendency to render this limitation on
 "legislative power directory merely, and to treat
 "it as if it were devoid even of moral obligation,
 "by resorting to local legislation upon matters,
 "which, if of importance, concern the people of
 "all parts of the State, we are impelled by duty,
 "whenever such acts are brought before us for
 "review, and their invalidity appears clear, to so
 "declare. Upon this ground the judgment of the
 "Circuit Court dismissing the case should be
 "affirmed."

The Court of Tennessee has held a similar law invalid.

State vs. Torry, 7 Bax., 95.

POINT III.

Upon the foregoing grounds it is respectfully urged that the judgment of conviction should be reversed.

ALBERT I. SIRE,
 Attorney for Plaintiff in Error.

No. 227.

App. of Sire for P. C.
Filed Jan. 24, 1898.**ADDENDA.**

Since the foregoing brief was prepared, we have discovered a late decision of the Supreme Court of California, declaring invalid upon constitutional grounds a section of the Penal Code of that State, which was an enactment very much like the one in the State of New York, which we here bring under review, differing in this respect however that the California statute prohibited all barbers from running their business on Sundays and on legal holidays after 12 o'clock noon.

The very forcible opinion of Judge HENSHAW, we quote from in part :

The objections urged to the law were that it contravened three sections of the Constitution of the State of California viz. :

" ALL men are by nature free and independent,
" and have certain inalienable rights, among which
" are those of enjoying and defending life and lib-
" erty, acquiring, possessing and protecting prop-
" erty and pursuing and obtaining safety and hap-
" piness (Const., Art. I, Sec. 1.)

" No special privileges or immunities shall ever
" be granted which may not be altered, revoked or
" repealed by the Legislature ; nor shall any citizen
" or class of citizens be granted privileges or im-
" munities which, upon the same terms, shall not
" be granted to all citizens (Const., Art. I, Sec. 21.)

" The Legislature shall not pass local or special
" laws in any of the following enumerated cases,
" that is to say :

“ 2. For the punishment of crimes and misdemeanors * * * in all cases where a general law can be made applicable (Const., Art. IV, Sec. 25, subds. 2, 33).”

After quoting this the Court delivered itself of the following opinion in part.

In the course of the opinion all of which is a valuable elucidation of the subject presented, and which we beg that the Court will read as a whole, the learned Justice says :

“ So, while the police power is one whose proper use works most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds, affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant.

“ We think the Act under consideration gives plain evidence of such encroachment. It is sought to be upheld by the argument that it is a police regulation ; that it seeks to protect labor against the oppression of capital ; that the people have passed the law, let not the Courts interfere with it and if the people are dissatisfied they may amend or repeal it.

* * * * *

“ The laboring barber, engaged in a most respectable, useful and cleanly pursuit, is singled out from the thousands of his fellows in other employments and told that, willy-nilly, he shall not work upon holidays and Sundays after twelve o'clock noon. His wishes, tastes or necessities are not consulted.

* * * * *

" A law is not always general because it operates
 " upon all within a class. There must be back of
 " that a substantial reason why it is made to oper-
 " ate only upon a class and not generally upon all.
 " As was said in *Pasadena vs. Stimson*, 91 Cal.,
 " 238: 'The conclusion is that although a
 " law is general and constitutional when it
 " applies equally to all persons embraced
 " in a class founded upon some natural or
 " intrinsic or constitutional distinction, it is not
 " general or constitutional if it confers particular
 " privileges or imposes peculiar disabilities or bur-
 " densome conditions in the exercise of a common
 " right upon a class of persons arbitrarily selected
 " from the general body of those who stand in pre-
 " cisely the same relation to the subject of the
 " law.' And in *Darcy vs. Mayor, etc., of San Jose*,
 " 104 Cal., 642: 'The classification, however, must
 " be founded upon differences which are either de-
 " fined by the Constitution or natural, and which
 " will suggest a reason which might rationally be
 " held to justify the diversity of legislation.' "

There are two other States in which we find this
 same question has been recently passed upon favor-
 able to our contention.

These are the cases of

City of Tacoma *vs.* Kreck (State of
 Washington, September 28th, 1896).

See 46 Pacific Rep. 255.

See also *State vs. Granneman* (Mis-
 souri, January 21st, 1896).

See 33 Southwestern Reporter 784.

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